



A Limited Liability Partnership
Counselors and Attorneys at Law

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December 3, 2018

Todd Nuccio
State Court Administrator
1111 E. Court Avenue
Des Moines, IA 50319

Via Email: Todd.Nuccio@iowacourts.gov
AND Regular U.S. Mail Delivery

RE: Elective Judicial Nominating Commissioner Vacancies

Dear Mr. Nuccio:

I am a resident member of the bar of Iowa's Third Congressional District, entitled under section 46.2 of the Iowa Code to participate in the election of my district's elective state judicial nominating commissioners. I write respectfully to request that you immediately begin the process of filling the vacancy in the office of the female elective judicial nominating commissioner that will occur on December 31, 2018, when the six-year term of Commissioner Connie Diekema expires. For purposes of consistency across the state (and for the same legal reasons set forth in this letter), I request that you to also begin the process of filling the vacancies of the female commissioner for the Fourth Congressional District and male commissioner for the Second Congressional District, which will also arise on that same date.

In 2008, the Iowa Legislature and Governor enacted legislation to realign the membership of the State Judicial Nominating Commission with the congressional districts to be established after the 2010 census. See 2008 Iowa Acts Chapter 1049. That legislation, which is codified as section 46.2A of the Iowa Code, terminated the terms of all state judicial nominating commissioners effective December 31, 2012. See Iowa Code § 46.2A(2). Section 46.2A also provides that the terms of all the newly elected commissioners "shall commence on January 1, 2013." Iowa Code § 46.2A(3).

In order to comply with the constitutional requirement of staggered six-year terms under the Article V, Section 16 of the Constitution of the State of Iowa, the statute provided that some elected commissioners would have two-year terms, others four-year terms, and still others six-year terms. See Iowa Code § 46.2A(5). The legislation further provided that following these initial transitional terms, "the elected members shall be elected to six-year terms as provided in section 46.2." Iowa Code § 46.2A(7).

Under the statute, the Third Congressional District was allocated one elected commissioner with a two-year term and one with a six-year term. See Iowa Code § 46.2A(5)(c). Through a process not established in statute, it was determined that the six-year term would be the female commissioner. See Iowa Code § 46.2A(6) (requiring that commissioners from each district be “gender balanced”). In an election conducted in December 2012, Connie Diekema was elected to serve a six-year term.

Commissioner Diekema’s term began on January 1, 2013. See Iowa Code § 46.2A(3). It was a six-year term. See Iowa Code § 46.2A(5)(c). Her term thus ends pursuant to section 46.2A on December 31, 2018. The term cannot extend beyond this six-year period because doing so would be contrary to this explicit statutory language. More importantly, extending her term will violate Article V, Section 16 of the Iowa Constitution, which provides that commissioners “shall serve for six-year terms” and that they “shall be ineligible for a second six-year term on the same commission.”

It is true that the commissioners elected to replace Commissioner Diekema and the others with expiring terms “shall be elected to six-year terms as provided in section 46.2” Iowa Code § 46.2A(7). That section *inter alia* provides for “a six-year term beginning July 1,” and elections “in January, immediately preceding the expiration of the term of a member.” Iowa Code § 46.2. But this section cannot be a basis to extend commissioners’ terms to six years and six months. Just like section 46.2A, it provides that the terms shall be *six* years, and properly so since a six-year-and-six-months term would be unconstitutional. See Iowa Const. Art. V, § 16.

The more recent and specific statute (i.e., Iowa Code Section 46.2A) must thus govern the dates of the beginning and end of the term. The July 1 start of the term in section 46.2 simply cannot be reconciled in a constitutional manner with the terms established in section 46.2A. But this is really no different than the conflict between the directive of section 46.2 that “districts shall alternate between women and men elected members” each term, and section 46.2A which now establishes two commissioners for each district that must be “gender balanced” so that at all times each district has a male and female commissioners. No one would suggest that we still must follow the directive to alternate, which would result in periods of time with two men or two women serving as commissioners from a district until the second staggered commissioner alternated back to the other gender. That is because section 46.2A trumps section 46.2 to the extent that the statutes conflict. The same is true here, and Commissioner Diekema’s term must expire on December 31, 2018, with an election must be held to elect her replacement to take office on or after January 1, 2019.

The problem is that your Notice of Election emailed on November 6, 2018, states that Ms. Diekema’s term “will expire June 30, 2019.” This is in conflict with Iowa law—both section

46.2A of the Iowa Code and Article V, Section 16 of the Iowa Constitution. Please correct this error to recognize that Ms. Diekema's term expires no later than December 31, 2018, and begin the process of filling this vacancy as expediently as possible under Iowa Code Chapter 46.

Because the Commission will soon begin the process of selecting nominees for the vacancies on the Iowa Supreme Court and the Iowa Court of Appeals, time is of the essence. The Iowa Code clearly allows the Commission to conduct its business with three vacant offices. See Iowa Code § 46.14 (stating, "Absence of a commissioner or vacancy upon the commission shall not invalidate a nomination."). But it would be unfortunate if Iowans from three congressional districts—or at least the lawyers in those districts—were underrepresented in this important process for our state.

If you do not intend to act on my request, I would respectfully ask that you notify me by December 7, 2018, so that I can decide whether it is necessary to take further appropriate action to protect my rights, the rights of other members of the bar, and the integrity this important process.

Sincerely,



William R. Gustoff

cc: Justice David Wiggins, Chair of the State Judicial Nominating Commission (via tamara.barrett@iowacourts.gov)
Chief Justice Mark Cady (via tamara.barrett@iowacourts.gov)
Governor Kim Reynolds (via sam.langholz@iowa.gov)
Suzan Boden, Fourth Congressional District Female Elective Commissioner of the State Judicial Nominating Commission
Martin Diaz, Second Congressional District Male Elective Commissioner of the State Judicial Nominating Commission
Connie Diekema, Third Congressional District Female Elective Commissioner of the State Judicial Nominating Commission

(NOTE: All courtesy copies sent via email attachment only)